INTERIOR BOARD OF INDIAN APPEALS

Merrill Karlen v. Commissioner of Indian Affairs

6 IBIA 181 (11/21/1977)

Related judicial case:

Proceeding for damages: *United States v. Karlen*, 476 F. Supp. 306 (D.S.D. 1979), affirmed, 645 F.2d 635 (8th Cir. 1981)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF MERRILL KARLEN
v.
COMMISSIONER OF INDIAN AFFAIRS

IBIA 76-30-A Decided November 21, 1977

Appeal from the decision of the Commissioner of Indian Affairs affirming the decision of the Superintendent, Lower Brule Agency, canceling Gifford Ranch lease (No. 22-086-405).

Affirmed.

APPEARANCES: Wallace G. Dunker, Esq., Field Solicitor, Department of the Interior, Aberdeen, South Dakota; Duncan, Olinger & Srstka, by William J. Srstka, Jr., Esq., for Appellee; James F. Margadant, Esq., and Gary E. Davis, Esq., for Appellant.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from the decision of the Commissioner of Indian Affairs, affirming the decision of the Area Director, Aberdeen, South Dakota, upholding the cancellation of Gifford Ranch lease (No. 22-086-405) on November 7, 1974, for, among other things, cutting of excessive quantities of hay from the ranch in the fall of 1974.

The position of Appellant, Merrill Karlen, is that special provision No. 10 contained in the lease, accorded him the privilege or right to cut and remove as much hay as he desired without regard to the stocking limitations set forth in paragraph 8 of said special provisions.

The Gifford Ranch lease was entered into on April 16, 1970, and expired on April 30, 1975.

Because of the severity of the winters, Karlen brought his cattle onto the Gifford Ranch on or about May 1 and removed them in or about the second week in October. Karlen apparently removed his cattle from said ranch for the last time in or about the second week of October 1974.

Subsequent to the November 7, 1974, cancellation of said lease, the Appellant Karlen was assessed $57,325 by the Lower Brule Agency Superintendent for the asserted lease violations. The Appellee contends this entire matter became moot after the Commissioner's decision of July 1, 1975, affirming the decision of the Superintendent, and that the only viable issue remaining is that of breach of contract and resulting damages, which is beyond the jurisdiction of this Board.

The Board did not agree since the question (regarding the cancellation of the lease) had not been finally resolved for the Department. The matter was referred to Administrative Law Judge Michael L. Morehouse for a fact-finding hearing and recommended decision. A hearing was held at Pierre, South Dakota, on December 6 and 7, 1976, after which briefs were submitted by the parties, findings of fact were made, and a recommended decision issued by the Judge on August 15, 1977.

The pertinent facts are set forth in Judge Morehouse's recommended decision. Accordingly, they are not repeated here. Consideration has been given to the complete record, including the contentions and arguments of Appellant and Appellee.

We find no merit to the contentions and arguments of the Appellant.

The Board agrees with the findings and conclusions of Judge Morehouse and adopts his findings and recommended decision attached hereto and dated August 15, 1977, as its own.

We agree that the measure of damages arising out of violations of said lease provisions must be determined in another forum.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the decision of the Commissioner of Indian Affairs affirming cancellation of Appellant Karlen's Gifford Ranch lease

(No. 22-086-405) by the Superintendent, Lower Brule Agency, on November 7, 1974, is AFFIRMED.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge

//original signed
Wm. Philip Horton
Administrative Judge

Attachment

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
HEARINGS DIVISION
SALT LAKE CITY, UTAH

August 15, 1977

MERRILL KARLEN, Appellant	)	IBIA 76-30-A
v.	)	Appeal from a decision
	)	of the Commissioner,
COMMISSIONER, BUREAU OF INDIAN AFFAIRS, Appellee	)	Bureau of Indian Affairs, dated July 31, 1975.

RECOMMENDED DECISION

This matter arises from the cancellation or attempted cancellation of a lease of real estate between appellant and the Lower Brule Sioux Tribal Council. It has a rather a long procedural history.

The lease was for a five-year term ending the last day of April 1975. On September 6, 1974, a letter from the agency's Superintendent was sent to appellant by certified mail requesting him to show cause within 10 days as to why the lease should not be cancelled. By letter dated October 1, 1974, appellant was given 30 days cancellation notice of the lease pursuant to 25 C.F.R. 131.14. Appellant filed a timely appeal to the Area Director, Bureau of Indian Affairs, requesting a formal hearing and suspension of the lease cancellation. By letter to appellant from the

Area Director, dated December 13, 1974, cancellation of the lease was acknowledged as of November 7, 1974, however, deviation from the regulatory procedure set out in 25 CFR 131.14 was also acknowledged and action on the appeal was suspended to provide the Superintendent additional time to document the lease violations with time to the petitioner to answer. Shortly thereafter, by letter dated December 19, 1974, appellant was assessed $57,325 by the Agency Superintendent for alleged lease violations. This assessment was affirmed by the Acting Area Director by letter dated January 30, 1975, and after timely appeal, by the Commissioner, Bureau of Indian Affairs. Appeal was taken to the Board of Indian Appeals who, on March 24, 1976, referred the matter to the Hearings Division, Office of Hearings and Appeals, for de novo hearing before an Administrative Law Judge who was to issue a recommended decision.

On May 17, and again on June 8, 1976, counsel for Bureau of Indian Affairs moved to dismiss the appeal on two grounds:

1. The issue concerning the propriety of the cancellation of the lease was moot since the lease had expired by its own terms on April 30, 1975; and

2. The only issue involved damages

and the Board had no jurisdiction to assess damages.

Appellant maintained that the lease was wrongfully terminated prior to its expiration. However, they agreed with the Bureau of Indian Affairs on the jurisdictional question and joined in a request that the appeal be dismissed, so that the parties could then repair to the proper United States Federal District Court to pursue the damage question.

A decision recommending dismissal of the appeal was issued July 20, 1976. On September 17, 1976, the Board again remanded the matter for a fact finding hearing "in order to determine whether the lease was improperly cancelled or terminated as alleged by the appellant, Merrill Karlen". Pursuant to said order, a hearing was held at Pierre, South Dakota, on December 6 and 7, 1976. Briefs have been filed by the parties.

In March 1970, the Lower Brule Sioux Tribal Council opened bids for the lease of the Gifford Ranch, consisting of some 8,290.46 acres. Mr. Merrill Karlen was the high bidder at $43 per cow unit and after some negotiation and discussion between Mr. Karlen, the tribal council, and a special committee made up of members of the tribal council specifically to consider this lease, Mr. Karlen was awarded the lease commencing on April 16, 1970, and ending the last day of April 1975. Yearly rental payments of

$18,146 was payable on approval and thereafter on May 1 of each succeeding year. See generally Exhibit G-2. Mr. Karlen testified that hay cutting was thoroughly discussed:

> . . . we discussed -- thoroughly discussed the hay cutting. I told them the reason I bid higher I figured because of hay privileges and I told them I planned on haying the ranch and moving the hay down to the Cable place to winter because the Gifford Ranch had no protection whatsoever, I didn't want any restrictions whatsoever on haying and the only thing I would agree to is I wouldn't hay the same ground twice and it was agreed to, by all or us there, that there wouldn't be no restrictions on my moving the hay down to the Cable place. Tr. Vol. II p. 212-213.

Mr. Karlen testified further that the hay cutting provision was the reason that he bid as high as he did and that he would not have gone through with the lease if his hay cutting had

been restricted. It should be noted here that Andrew and Grace Estes who were members of the tribal council when these negotiations were conducted were subpoenaed to appear at the hearing by Mr. Karlen and they did not appear. Mr. Joseph Brewer, area realty officer, testified that he was present during part of the lease negotiations and recalled that Mr. Karlen wanted to cut hay and feed cattle off the leased property. A special clause was therefore inserted in the lease to provide for this.

The pertinent provisions of the lease are as follows:

Additional Provisions

* * *

8. Pasture may be stocked by one of the following:

422 cow-units yearlong

644 cow-units for six (6) months
from May 1 to October 31

753 cow-units for five (5) months
from May 1 to September 3.0

562 head yearlings yearlong

844 head yearlings for six (6)
months from May 1 to October 31

The Lessee may also stock the pasture by a substitute method so long as he notifies the Lessor and Superintendent by May 1 of each year of plans and must also give notice of any subsequent change in plans prior to making the change during the grazing year.

In addition to the above, the Lessee is allowed to pasture bulls, for breeding purposes, at the rate of $3.00 per head per month during the breeding season.

Penalty for overstocking will be at the rate of $1.00 per head per day for the number of stock in excess of the prescribed carrying capacity.

* * *

10. Native hay and substitute feed crops may be harvested for feeding purposes only. Native hay must not be cut on the same area in consecutive years unless an unusual wet year will permit it without causing damage to the grass growth. In this instance the Lessee must obtain written permission to cut the same area from the Lessor and Superintendent.

* * *

> 12. If through management a plan is developed by the Lessee, during the term of this lease, it is found that the property could support more cattle, the parties and approving office of this contract, by mutual agreement adjust the stocking and rental accordingly.

Mr. Karlen testified that he cut hay each of the five years of his occupancy; moved the hay off the leased premises to the Cable Ranch where he fed his stock; that his stocking methods underwent constant change due to the nature of his operation and that he would notify the proper officials of these changes sometimes verbally and several times in writing after being requested to do so; that he never used up all of his AUM's during any of the five years of the lease and that according to his calculation, in the year in question, 1974, he put his cattle out on the ranch in July and took them off in October, due to the weather, and that he was "short quite a lot of units" that year. He conceded that there was a considerable number of haystacks on the ranch in the late summer and early fall of 1974 but that some of these were old stacks from prior years. He contracted for hay cutting on the ranch in 1974 and

estimated that he paid for between 400 and 500 tons at approximately $20 a ton. He added that the ranch was badly over-grazed in 1970 and was in much better condition at the end of the lease period. All of the hay and cattle were removed from the leased premises by approximately the middle of October 1974.

Michael Jandreau, a member of the Lower Brule Sioux Indian Tribe, acquired a small unit of land adjacent to the Gifford Ranch in 1971 and testified that since that time he was familiar with Mr. Karlen's operation. He was elected to the tribal council in 1971 and has been council chairman since 1973. Relations between the tribe and Mr. Karlen have not been good over the years. He stated that in the years 1970, 1971, and 1972, he did not observe any general hay cutting as far as he can recall, but that in 1973, approximately 15 quarter sections were hayed by Mr. Karlen, stacked, and removed from the property. He complained of this to the Agency Superintendent as being a lease violation, but nothing was done. In 1974, he observed approximately 112 stacks of hay on the property, most of which had been recently cut, which were estimated at 12 to 14 tons a stack. He again complained to the Agency Superintendent and this resulted in the cancellation efforts noted above. Carl Smith, a Natural Resource Specialist, testified that he counted 195 haystacks

on the leased premises on September 15, 1974. Fourteen of the stacks were measured to estimate tonnage. John Sutphin, Economic Development Officer on the Lower Brule in 1974 testified that he made at least a dozen trips to the leased ranch to count haystacks, cattle, and observe the condition of the buildings and that according to the cattle counts made by himself, it was his opinion that Mr. Karlen kept pretty close to his cattle stocking plan. He stated further that he estimated that Mr. Karlen had 4,711 unused cow days at the end of 1974.

The only issue to be resolved is whether the lease was properly terminated. Mr. Karlen made all payments required by the lease and there is no substantial evidence that be was deprived of his occupancy or any benefits thereof by attempts to cancel the lease. It is not possible to determine exactly when the lease was terminated but in my view, the lease was terminated some time subsequent to the removal of the hay and the cattle from the premises in October 1974, and the expiration of the lease on April 30, 1975. It is Mr. Karlen's position that paragraph 10 of the additional provisions set out above allowed him, according to his understanding, to cut and remove as much hay as he desired without regard to the stocking limitations set out in paragraph 8. It is Appellee's position that paragraph 10 is limited by the provisions of paragraph 8 and that the hay cutting done by Mr. Karlen

in the summer and fall of 1974 was grossly in excess of the cow unit limitations contained in that paragraph (when considered with that year's grazing practices) and that this was in violation of the terms of the lease and justified cancellation.

I must agree with Appellee. This land was put up for lease on the basis of its cow carrying capability which was determined by the tribal council to be 422 cow-units year long. It was on the basis of price per cow unit that bids were made and that a yearly rental was determined. Clause 10 and the evidence concerning negotiations leading up to its insertion in the lease, clearly allowed Mr. Karlen to cut hay, remove it from the leased premises and feed his cattle as long as he did not exceed his cow unit limitation. But to construe the lease as allowing a lessee to use up all of his cow units by grazing and, in addition, to allow him to cut unlimited amounts of hay, take it off the property and feed additional cattle, simply does not make sense.

It is my view that there was sufficient evidence of excess hay cutting in the fall of 1974 to justify the actions that were taken to cancel the lease.

It is true that paragraph 8 of the lease carries a liquidated damage provision setting a rate of $1.00 per head per day for the number of stock in excess of the prescribed carrying

capacity. It may be presumed, however, that this provision should be applied in the case of a casual and inadvertent overstocking to remedy a non-material breach; not to settle a dispute over a lease provision that results in a potential overstocking represented by 195 stacks of hay at 12 to 14 tons a stack. The actual amount of excess cow units represented by the hay cutting and offsetting factors such as unused cow units over the 5 year period, together with the measure to be used in calculating damages, if any, must be determined in another forum.

//original signed
Michael L. Morehouse
Administrative Law Judge